

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

IN RE: OPENAI, INC. COPYRIGHT
INFRINGEMENT LITIGATION

Transfer From the United States District
Court for the District of Delaware:

ZIFF DAVIS, et al. v. OPENAI, INC. et al., No.
1:25-cv-04315-SHS-OTW

25-md-3143 (SHS) (OTW)

**PLAINTIFFS ZIFF DAVIS'S NOTICE OF MOTION AND MOTION TO STRIKE
OPENAI, INC'S REPLY DECLARATION**

Please take notice that upon the accompanying Memorandum of Law, the undersigned hereby moves the Court on behalf of Plaintiffs Ziff Davis, Inc., Ziff Davis, LLC, IGN Entertainment, Inc., Everyday Health Media, LLC, Mashable, Inc., and CNET Media, Inc. ("Ziff Davis"), before the Honorable Sidney H. Stein in Courtroom 23A of the United States District Court for the Southern District of New York, Daniel Patrick Moynihan Courthouse, 500 Pearl Street, New York, New York, 10007, for an order to strike the Declaration of Carolyn M. Homer (ECF No. 283/285) submitted in support of the Reply of defendants OpenAI, Inc., OpenAI GP, LLC, OpenAI, LLC, OpenAI Opco LLC, OpenAI Global LLC, OAI Corporation and OpenAI Holdings, LLC ("OpenAI") (ECF No. 282/284) in further support of their motion for a partial stay (ECF No. 136), for the reasons set forth herein.

Dated: New York, New York
July 3, 2025

Respectfully submitted,

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**PLAINTIFF ZIFF DAVIS’S MEMORANDUM OF LAW IN SUPPORT OF
ITS MOTION TO STRIKE OPENAI’S REPLY DECLARATION**

Plaintiffs Ziff Davis, Inc., Ziff Davis, LLC, IGN Entertainment, Inc., and Everyday Health Media, LLC, Mashable, Inc., and CNET Media, Inc. (“Ziff Davis”), by and through undersigned counsel, hereby submit this memorandum of law in support of Ziff Davis’s motion to strike the Declaration of attorney Carolyn M. Homer dated June 30, 2025 (ECF No. 283/285), “Homer Decl.”), and related portions of the Reply Memorandum of Law filed by defendants OpenAI, Inc., OpenAI GP, LLC, OpenAI, LLC, OpenAI Opco LLC, OpenAI Global LLC, OAI Corporation and OpenAI Holdings, LLC (“OpenAI”) on June 30, 2025 (ECF No. 282/284, “Reply”) in further support of OpenAI’s motion to stay (ECF No. 136, “Mot.”). As discussed herein, this Court should grant Ziff Davis’s motion to strike because: (1) defendants improperly introduce new evidence in their reply; and (2) statements made by attorney Homer in her declaration are speculative and made without factual support.

PROCEDURAL BACKGROUND

OpenAI has filed a partial motion to stay three of the causes of actions in Ziff Davis’s nine-

count complaint,¹ as well as to stay proceedings related to certain AI models, which by OpenAI's own admission at least required it to present support for five factors: "(1) the private interests of the plaintiffs in proceeding expeditiously with the civil litigation as balanced against the prejudice to the plaintiffs if delayed; (2) the private interests of and burden on the defendants; (3) the interests of the courts; (4) the interests of persons not parties to the civil litigation; and (5) the public interest." Mot., at 4. However, OpenAI's motion cited no evidentiary support for the above factors.

Now, on Reply, OpenAI submits an attorney declaration from one of the attorneys representing OpenAI in this action, Carolyn M. Homer, in support of OpenAI's argument that proceeding without the requested stay will "impose an unnecessary burden on OpenAI" (Reply, at 3). Based on her professed personal knowledge, Ms. Homer states that:

- With respect to training data, "[b]ased on prior collections for in-scope models, requiring OpenAI to collect, review, and produce each post-training module applicable to each of Ziff Davis's nine new models would significantly burden OpenAI and delay discovery across all MDL cases—resulting in approximately an additional four to six months of discovery to collect and make available for inspection such data." (Homer Decl. ¶ 10);
- With respect to source code, "[b]ecause many of these out-of-scope models were developed by separate teams with separate code bases and the volume of source code underlying OpenAI's models has grown, OpenAI's [sic] conservatively estimates that making available for inspection the additional source code files for the GPT-4.5, GPT-4.1, o1-mini, o1, o3-mini, o1-pro, o3, and o4-mini models would double that volume. This would delay discovery by four to six months." (Homer Decl. ¶ 12); and
- With respect to traditional document review, "Discovery into nine additional models (GPT-4.5, GPT-4.1, GPT-5, o1-mini, o1, o1-pro, o3-mini, o3, and o4-mini) would implicate additional custodians, collections, and search terms as many of them were developed by separate teams. OpenAI has preliminarily tested the expanded model terms—the nine new models—on data it already has collected. Although this is underinclusive, OpenAI's estimate is that it would take an additional four to six months to review the resulting hits." (Homer Decl. ¶ 14).

¹ Ziff Davis has now amended its complaint in response to a motion to dismiss brought by OpenAI, but those amendments largely have no bearing on OpenAI's motion for a stay, which remains pending.

ARGUMENT

It is well-established in this Circuit that “[i]t is plainly improper to submit on reply evidentiary information that was available to the moving party at the time that it filed its motion and that is necessary in order for that party to meet its burden.” *Kravitz v. Binda*, No. 17-CV-07461, 2020 WL 927534 (S.D.N.Y. Jan. 21, 2020) (citing *Revise Clothing, Inc. v. Joe’s Jeans Subsidiary, Inc.*, 687 F. Supp. 2d 381, 387 (S.D.N.Y. 2010)). Further, “[a] court may strike portions of reply submissions if they add new material that should have been included in the opening papers, as long as the new material is not merely in response to a new issue raised by the opposition papers.” *Perez v. Manna 2nd Avenue*, No. 15 Civ. 4655, 2016 WL 7489040, *4 (S.D.N.Y. Dec. 28, 2016). Although the Court has discretion to consider material “filed in violation of procedural rules,” see *Church & Dwight Co. v. Kaloti Enterprises of Michigan, L.L.C.*, No. 07 CV 612, 2011 WL 4529605, at *1 n.1 (E.D.N.Y. Sept. 28, 2011) (quoting *Revise Clothing*, 687 F. Supp. 2d at 387), here there is no excuse for OpenAI’s failure to present the evidence timely in support of its motion, and in any event the statements presented by OpenAI’s counsel should not be admissible in support of the stay motion.

In its opening memorandum, OpenAI expressly argued that “[e]xpanding the scope of discovery to include Ziff Davis’s recently introduced new claims and models would necessitate similar effort, time, and resources as spent on the eight models currently within the scope case.” Mot., at 8. However, for reasons unknown, it failed to support this statement or others like it with any evidence at all, although it was clearly in OpenAI’s possession. While Ziff Davis pointed out these failings in its Opposition, this did not constitute new arguments that OpenAI was justified in addressing on reply. Rather, this is a classic example of the type of “sandbagging” that the rule against presenting new arguments and evidence on reply is designed to prohibit: OpenAI appears to have deliberately waited to spring the new declaration on Ziff Davis (and the Court) in order to

obtain strategic advantage. *Wolters Kluwer Financial Services Inc. v. Scivantage*, No. 07 CV 2352, 2007 WL 1098714 (S.D.N.Y. Apr. 12, 2007) (“[I]t is established beyond peradventure that it is improper to sandbag one's opponent by raising new matter in reply.”) (citing *Murphy v. Village of Hoffman Estates*, 1999 U.S. Dist. LEXIS 3320, at *5-6 (N.D.Ill.1999)). For this reason alone, the Homer Declaration, as well as the related portions of OpenAI’s Reply (at pages 3-4) should be stricken in its entirety.

One reason OpenAI may have chosen to submit new material on reply here is that many of the specific “facts” presented by Ms. Homer are not cognizable in any event. First, it is not at all clear that Ms. Homer is presenting evidence based on her own direct knowledge, as required by Fed. R. Civ. P. 56(c)(4), as she states that “*OpenAI*] *conservatively estimates* that making available for inspection the additional source code . . . would double that volume” and “*OpenAI has preliminarily tested* the expanded model terms . . . on data it already has collected” and “*OpenAI’s estimate is* that it would take an additional four to six months to review the resulting hits.” Homer Decl., ¶¶ 12-14 (emphases added). Second, the conclusory “estimates” are entirely speculative and unsupported by any facts beyond vague comparisons with prior productions² – Ms. Homer provides no information on prior or anticipated volume, the actual numbers of individuals or teams involved, or even hit counts for the “preliminarily testing” OpenAI purportedly has conducted using “expanded model terms.” See *Internet Law Library, Inc. v. Southridge Capital Mgmt., LLC*, No. 01 CIV. 6600 (RLC), 2005 WL 3370542, at *3 (S.D.N.Y. Dec. 12, 2005) (striking attorney declaration where attorney did not have personal knowledge); *Degelman Indus., Ltd. v. Pro-Tech Welding & Fabrication, Inc.*, No. 06-CV-6346T, 2011 WL 6752565 (W.D.N.Y. Dec. 23, 2011) (striking attorney declaration that relied on hearsay and

² So too are Ms. Homer’s statements that OpenAI’s employee ranks have grown “exponentially,” and that use of OpenAI’s communications channels have grown “exponentially in tandem.” Homer Decl. ¶ 16.

conjecture, and was argumentative). In short, the limited conclusions set forth in the declaration do not provide sufficient detail for Ziff Davis to probe further or respond to the Motion.

Additionally, although the declaration states that providing training data, source code and traditional discovery will each (somewhat remarkably) require OpenAI “four to six months” of additional time, based on the manner in which production/inspection has otherwise proceeded in this case, it appears that this additional production/inspection can and would proceed simultaneously, yielding a *total* of as little as four additional months. Given that eight months remain for fact discovery, Ms. Homer’s statements appear irrelevant to this motion—or if anything suggest that OpenAI can comfortably complete the necessary fact discovery within the current discovery period as established in the agreed and approved case schedule (ECF No. 238)—and should be stricken.

Dated: New York, New York
July 3, 2025

Respectfully submitted,

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